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United States Supreme Court

OCTOBER TERM 1959

NO. 600

WILLIAM LANGFORD HODGE and ROBERT BRANCH,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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HAYES PRINTING CO., PENSACOLA, FLA.

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United States Supreme Court

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NO._____

WILLIAM LANGFORD HODGE and ROBERT BRANCH,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioners, William Langford Hodge and Robert Branch, by their attorney, Clyde W. Atkinson, present this their petition for writ of certiorari:

REPORT OF OPINION BELOW

The District Court entered judgment and imposed sentence but did deliver an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. The opinion is attached hereto.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. Petitioners seek to have reviewed a judgment of the United States Court of Appeals Fifth Circuit, dated the 30th of October, A. D. 1959, affirming the judgment of the United States District Court for the Northern District of Florida, Tallahassee Division, on appeal, a certified copy being attached hereto.

2. This petition is accompanied by a certified transcript of the Record of the proceedings petitioners seek to have reviewed.

3. Petitioners were convicted in the United District Court of the Northern District of Florida, Tallahassee Division, on the 12th day of February, 1959 (R 7) on two counts for dealing in non-tax paid distilled spirits or liquors and selling non-tax paid distilled spirts or liquors in violation of Title 18 United States Code Section 371 and Title 26 United States Code Sections 5008(b)(1) and 5642, petitioners were sentenced to imprisonment for three years upon each of said counts one and two of the indictment, the sentences to run concurrently. (R 139-143)

A motion for new trial was denied by said District Court on the 13th day of February 1959. (R. 139)

An entry of Appeal to the United States Court of Appeals, Fifth Circuit, was filed on the 20th day of March 1959 (R 147-148) and on the 30th day of October 1959, said United States Court of Appeals dated and entered its Judgment affirming the judgment of the said District Court. (R 153)

Petitioners filed an application for rehearing with the United States Circuit Court of Appeals, Fifth Circuit on the 18th of November, 1959, and the same was denied by order of said court on the 28th day of November 1959, (R 162) a copy of which is appended hereto.

The statutory provision confering on this Honorable Court's jurisdiction to review the judgment of the United States Circuit Court of Appeals, Fifth Circuit is 62 Statutes 928 (June 25, 1948, Chapter 646).

The petitioners further show that the judgment of the District Court of Florida as affirmed by the United States Circuit Court of Appeals, Fifth Circuit, is not in accord with law and justice and petitioners are without remedy in the premises, to have the judgment of said Circuit Court of Appeals reviewed except on Writ of Certiorari issued for such by this Honorable Court.

QUESTION PRESENTED FOR REVIEW

The point relied on by petitioners for granting the Writ of Certiorari is as follows:

The trial court erred by limiting counsel for the petitioners to thirty minutes to argue their case to jury when counsel had requested forty minutes.

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES:

AMENDMENT V.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offence to be twice put in jeojardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Titles 1-19 United States Code, Page XLVI (1958 Ed.)

STATEMENT OF THE CASE

The petitioners were indicted by the Grand Jury at Tallahassee, Florida, on the 4th day of September, A. D. 1958 charging in Count One that the defendants conspired: to feloniously transport, conspire, buy, sell, or transfer distilled spirits with no Internal Revenue Stamps on the container in violation of title 26 United States Code Section 5008(b)(1) and 5642; to wilfully and fraudulently carry on a business of a wholesale dealer in distilled spirits without first having paid the special tax in violation of Title 26 United States Code Section 5111(a)(1), 5142, and 5691; to wilfully and fraudulently attempt to evade payment of taxes

due the United States on distilled spirits in violation of Title 26 United States Code Section 7201; to wilfully and fraudulently remove, deposit and conceal goods upon which taxes are payable with intent to evade the collection of the tax in violation of Title 26 United States Code Section 7204(4) and in Count Two that the defendants did feloniously sell distilled spirits in containers upon which no Internal Revenue Stamps were affixed in violation of Title 26 United States Code Sections 5008(b)(1) and 5642 (R 1-4).

On September 8, 1958 the petitioners pleaded not guilty and on February 12, 1959, the petitioners were tried on said charges and found guilty of both counts (R 5-7) and the Court sentenced each petitioner to imprisonment for three years on each count the sentences to run concurrently. (R 139-143)

The trial of the case lasted one full day and there were five witnesses who testified during the trial (R 13, 40, 67, 95, 115) and the transcript of record was over one hundred pages in length.

At the conclusion of the evidence counsel for the petitioners requested forty minutes in which to argue the case to the jury (R 119) but the trial court limited petitioners' counsel to thirty minutes (R 119) this ruling in effect permitted each petitioner only fifteen minutes in which to have his case presented and argued to the jury.

ARGUMENT

We first call the Court's attention to the fact that five witnesses testified in the case at trial, that the transcript of record was over one hundred pages in length, that the trial lasted one full day, and that two defendants were tried in the same trial under a two count indictment.

We submit that the trial court erred by denying counsel for the petitioners a time period of forty minutes in which to argue the case to the jury and that the trial judge in limiting counsel to only thirty minutes abused his discretion and committed reversible error.

The effect of the Court's ruling in limiting the argument to the jury to thirty minutes was to allow only fifteen minutes to each petitioner. We submit that limiting the argument to fifteen minutes for each petitioner was a clear abuse of discretion and in fact deprived the petitioners of their constitutional right to be heard by counsel and further it was a deprivation of due process of law as is protected by the Sixth and Fifth Amendments respectfully to the constitution of the United States.

In the case of **Rossi v. United States**, Eighth Circuit, 1925, 9F.(2d) 362, 368 the Court stated:

> "The constitutional right of defendant to be heard by counsel cannot be taken away by a court. The court has a right to limit within proper bounds the time of argument, in order to prevent abuse thereof; but it cannot place such a limit as to prevent a full and fair presentation of defendant's case to the jury by his counsel. The right to counsel is at least partially destroyed, if sufficient time is not allowed to fully and fairly present the facts. While it is just criticism of criminal practice that too much time is consumed in the trial of cases, nevertheless it is of greater importance that those accused of crime have the right, within reasonable bounds and according to the rules of the court, conducive to orderly procedure of business, to present their defense, than that time be saved."

The court in Rossi v. United States, supra, particularly pointed out that 13 witnesses testified and the evidence covered 54 printed pages of the transcript of record and that this and other circumstances were to be considered in determining whether the trial judge erred in limiting the argument to the jury. Although only five witnesses testified in the case at Bar, there was over 100 pages in the transcript of record and the evidence was conflicting throughout the trial. We submit that the petitioners were entitled to have an adequate time allotted to their counsel in arguing the case to the jruy so that a full and fair presentation of the petitioners case could be rendered. We further submit that thirty minutes or fifteen minutes for each petitioner was not sufficient and further that forty minutes or twenty minutes for each petitioner as requested was not an unreasonable request by counsel for the petitioners.

In **Klop v. United States**, Sixth Circuit, 2 F.(2d) 953, 954 the court in holding a limitation of ten minutes for the argument to the jury in behalf of the defendant was unreasonable, stated:

> "While promptness and speed in trial work are highly commendable, we cannot believe that a limitation of ten minutes for argument, as originally allowed, could over objection be deemed reasonable."

Although the Court in the case cited above pointed out the fact that the objection to a ruling of the trial Judge was necessary to raise such a time limitation as error. We submit that the above authorities were decided prior to the adoption of Rule 51 Federal Rules of Criminal Procedure, which rule no longer requires an exception to be made to a ruling by the trial judge.

The court in **York v. United States**, Sixth Circuit, 1924, 299 F. 778, 779 held that permitting counsel only twenty minutes in which to argue the defendant's case to the jury was an abuse of discretion. The court stated:

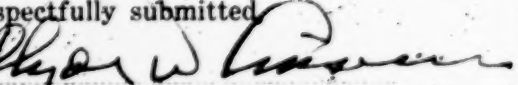
> " . . . the limitation in the instant case to 20 minutes over the protest of counsel, both before the argument and at the end of exactly 20 minutes, and the refusal to extend the time to enanble him fairly to cover the points he wished to urge, must, in the circumstances, be deemed such an abuse."

We submit that the limitation of thirty minutes imposed upon counsel for the petitioners in effect gave each petitioner only fifteen minutes and as such prevented the petitioners from having full and fair presentation of their case to the jury. It is further submitted that this limitation deprived the petitioners of their constitutional right to be represented by counsel.

PRAYER

WHEREFORE, Petitioners, William Langford Hodge and Robert Branch, pray that they may be granted a writ of certiorari and that this Honorable Court consider the certified transcript of record hereto attached and on hearing the judgment of the Circuit Court of Appeals, affirming the judgment of the District Court of Florida, be quashed, and that petitioners further pray for such other and further general relief as may be meet and proper.

Respectfully submitted



CLYDE W. ATKINSON
515 East Tennessee Street
Tallahassee, Florida
Attorney for Petitioners.

CERTIFICATE

I hereby certify that I served a copy of the foregoing petition for Writ of Certiorari, by mail, to Honorable Wilfred C. Varn, United States Attorney, Tallahassee, Florida, attorney for Respondent, and a copy to Solicitor General, Department of Justice, Washington, 25, D. C., on this the 16th day of December, A. D. 1959.

Clyde W. Atkinson

CLYDE W. ATKINSON

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17704

WILLIAM LANGFORD HODGE and ROBERT BRANCH,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA.

(October 30, 1959.)

Before RIVES, Chief Judge, and TUTTLE and JONES, Circuit Judges.

PER CURIAM: The only insistence on error is in the district court's refusal to allow appellants' counsel forty minutes as requested for argument to the jury and the allowance instead of thirty minutes. See **Rossi v. U. S.**, 8 Cir. 1925, 9 F. 2d 362, 368. We find no abuse of discretion. The judgment is

AFFIRMED.

A true copy
Test: /s/ Edward W. Wadsworth
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
Dec. 2, 1959

JUDGMENT.

Extract from the Minutes of October 30, 1959.

WILLIAM LANGFORD HODGE and ROBERT BRANCH,

No. 17704

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of Florida, and was argued by counnsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

* * * * *

ORDER DENYING REHEARING.

Extract from the Minutes of November 28, 1959.

WILLIAM LANGFORD HODGE and ROBERT BRANCH,

No. 17704.

versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.

* * * * *

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No. 800

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIAM LANGFORD HODGE AND ROBERT BRANCH,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM R. WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys,
Department of Justice,
Washington 25, D. C.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 600

WILLIAM LANGFORD HODGE AND ROBERT BRANCH,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 10) is reported at 271 F. 2d 52.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1959 (Pet. 11). A petition for rehearing was denied on November 28, 1959 (Pet. 12). The peti-

tion for a writ of certiorari was filed on December 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the allowance of 30 minutes for argument before the jury, when 40 minutes had been requested, constituted an abuse of discretion by the trial judge.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals for the Fifth Circuit (Pet. 11) affirming a conviction in the United States District Court for the Northern District of Florida, after a trial by jury, for conspiracy to violate the laws involving distilled spirits, and for sale of such spirits, in violation of 18 U.S.C. 371 and 26 U.S.C. 5008(b)(1) and 5642 (R. 139-140, 142-143). Concurrent sentences of 3 years were imposed upon each of the two counts (R. 140, 142-143).

The entire trial took place on February 12, 1959, including the impaneling of the jury, opening statements, taking of testimony, and verdict (R. 4-7). Two government agents testified to the same facts, *i.e.*, the purchases of non-tax-paid spirits from petitioners on two separate occasions, both petitioners participating in the sales (R. 13-64).

The informer who had brought the agents together with petitioners became a witness against the government, testifying that petitioner Hodge, although present, had not participated in the sales (R. 67-93). Petitioner Hodge testified to substantially the same version as the informer (R. 102-114), and petitioner Branch

testified to his own exclusive guilt in making the sales (R. 95-102).

ARGUMENT

At the time for closing argument, the following colloquy occurred (R. 119):

> THE COURT: All right, I'll give my usual charge including that on conspiracy. How long will you want to argue?
>
> MR. ATKINSON: No more than forty minutes for our side.
>
> THE COURT: Now your side can't have more than thirty minutes. Let's get through with it today.
>
> MR. ATKINSON: All right, sir.
>
> THE COURT: Thirty minutes. Court will be in recess for about five minutes.

Petitioners' counsel obviously felt no important need for 40 minutes of argument rather than the 30 minutes allowed. They agreed to the lesser time and objected only on appeal. The case was a simple one and the only real conflict was as to whether petitioner Hodge was a bystander or a participant. Thirty minutes for argument was therefore ample.

"It is well settled that the limitation of time for arguments of counsel is within the sound discretion of the trial court". *Capriola* v. *United States*, 61 F. 2d 5, 6, 11 (C.A. 7), certiorari denied, *sub nom. Walsh* v. *United States*, 287 U.S. 671 (59 defendants, 2 hours' time); *Samuels* v. *United States*, 232 Fed. 536, 538, 543-544 (C.A. 8), (41 witnesses, 30 minutes' time); *Wagman* v. *United States*, 269 Fed. 568, 573-574 (C.A. 6), certiorari denied, 255 U.S. 572 (liquor transportation,

22 minutes); *Cases* v. *United States*, 131 F. 2d 916, 925 (C.A. 1), certiorari denied, *sub nom. Velazquez* v. *United States*, 319 U.S. 770 (transporting and receiving fire arms, 20 minutes).[1]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

JANUARY 1960.

[1] *Rossi* v. *United States*, 9 F. 2d 362 (C.A. 8), cited by petitioners, is clearly inapposite. There, only 15 minutes was allowed for argument in a trial involving 13 witnesses. In *Kolp* v. *United States*, 2 F. 2d 953 (C.A. 6), in which 15 minutes was allowed for argument, defendant's version of the sale of liquor was supported by "a number of witnesses, largely his employes or friends", and the case involved four officers as purchasers, two of whom testified; and a critical missing witness. Questions of aiding and abetting and entrapment also added complexity. In *York* v. *United States*, 299 Fed. 778 (C.A. 6), likewise cited by petitioners, there was a limitation to 20 minutes in a case involving 233 pages of transcript, "over the protest of counsel, both before the argument and at the end of exactly 20 minutes, and the refusal to extend the time to enable him fairly to cover the points he wished to urge" (299 Fed. at 779).

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